



ORIGINAL

The Honorable Robert J Bryan

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOHN S TEMPLE,

Plaintiff,

v

ALLSTATE INSURANCE COMPANY, a  
foreign corporation,

Defendant

NO C01-5124 RJB

**DEFENDANT'S OPPOSITION  
TO PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT**

CV 01-05124 #000000~9

DEFENDANT'S OPPOSITION TO PARTIAL  
SUMMARY JUDGMENT - Case No C01-5124RJB  
291/322477 02  
090902/1346/42496 00103

Riddell Williams P S  
1001 FOURTH AVENUE PLAZA  
SUITE 4500  
SEATTLE, WA 98154-1065  
(206) 824-3600

79

## TABLE OF CONTENTS

		Page
1		
2		
3	I STATEMENT OF FACTS . . . . .	1
4	II SOME OF THE EVIDENCE SUBMITTED BY TEMPLE IS INADMISSIBLE	
5	AND SHOULD BE STRICKEN FROM THE RECORD . . . . .	1
6	III ALLSTATE, NOT PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT	
7	ON PLAINTIFF'S RETALIATION CLAIMS . . . . .	1
8	A Plaintiff Did Not Engage in Protected Activity . . . . .	2
9	B Allstate's Conditional Offer of Enhanced Post-Termination	
10	Benefits Was Not An Adverse Employment Action . . . . .	5
11	C Temple Cannot Establish Retaliation Because He Has No	
12	Evidence of Any Causal Link Between Any Protected Activity	
13	and Allstate's Alleged Adverse Action . . . . .	9
14	IV ALLSTATE, NOT PLAINTIFF, IS ENTITLED TO SUMMARY JUDGMENT	
15	ON PLAINTIFF'S DISPARATE IMPACT CLAIM . . . . .	12
16	A Plaintiff's Disparate Impact Claim Is Conclusively Rebutted By	
17	Allstate's Undisputed Statistical Evidence . . . . .	12
18	B Plaintiff has No Legal Support for his Novel Disparate Impact	
19	Theory . . . . .	14
20	V ALLSTATE, NOT PLAINTIFF, IS ENTITLED TO SUMMARY JUDGMENT	
21	ON HIS DISABILITY CLAIM . . . . .	15
22	A Temple was Not a "Qualified Individual with a Disability"	
23	Because he Could Not Meet the Agency Standards . . . . .	16
24	B Temple's Condition Did Not Qualify For Protection Under	
25	Disability Laws During the Vast Majority of his Employment with	
26	Allstate . . . . .	18
	1 Temple Was Not Disabled From November 1998 to April	
	1999 . . . . .	19
	2 Temple Was Not a Qualified Individual With a Disability	
	After January 2000 . . . . .	20
	3 Whether Temple Was Disabled From May 1999 to	
	December 1999 is, at Best, Disputed . . . . .	21

**TABLE OF CONTENTS**  
(continued)

			<b>Page</b>
1			
2			
3	a	Whether Temple Was Disabled Under the WLAD	
4		During the Second Time Period is, at best,	
		Disputed	21
5	b	Whether Temple Was Disabled Under the ADA	
6		During the Second Time Period is, at Best,	
		Disputed	25
7	C	Temple Did Not Give Allstate Adequate Notice of His Alleged	
8		Need for Accommodation	26
9	D	Allstate Responded to Temple's Request for Accommodation	
		Appropriately. . . . .	29
10	1	There is Ample Evidence That Allstate Engaged in the	
11		Interactive Process With Temple	29
12	2	Allstate Provided One of the Accommodations	
13		Requested by Plaintiff And Was Not Required to Provide	
		the Other	31
14	3	Allstate Handled Temple's Later Requests for	
		Accommodation Properly	35
15	VI	CONCLUSION	3
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			

1 Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's Motion") relies on  
 2 a strained and distorted account of both the facts and the law. A complete and  
 3 accurate reading of the record and the cases confirms that the Allstate programs  
 4 and standards under attack in this lawsuit were designed for legitimate business  
 5 purposes and implemented in a lawful manner. For that reason, and those set forth  
 6 in Allstate's Motion for Summary Judgment, Allstate is entitled to summary  
 7 judgment on all of Plaintiff's claims, and Plaintiff's Motion should be denied.

### 8 **I. STATEMENT OF FACTS**

9 Allstate refers the Court to its Motion for Summary Judgment for a  
 10 description of the relevant (and undisputed) facts.

### 11 **II. SOME OF THE EVIDENCE SUBMITTED BY TEMPLE IS INADMISSIBLE AND** 12 **SHOULD BE STRICKEN FROM THE RECORD.**

13 Temple submits a number of declarations that should be stricken from the  
 14 record because the witnesses were not properly disclosed to Allstate. See  
 15 Allstate's Motion in Limine to Exclude Testimony by Late-Disclosed Witnesses.<sup>1</sup>

### 16 **III. ALLSTATE, NOT PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON** 17 **PLAINTIFF'S RETALIATION CLAIMS.**

18 Plaintiff's claim that Allstate's Preparing for the Future Program ("Program")  
 19 was part of a "war" designed to eliminate "troublemakers" like Temple is full of  
 20 rhetoric, but devoid of factual or legal support. The Court must deny Plaintiff's  
 21 Motion and grant summary judgment in favor of Allstate because Plaintiff cannot  
 22 establish a prima facie case of retaliation under state and federal law and, even if  
 23 he could, he has no evidence to refute Allstate's legitimate business purpose for the  
 24 Program.

25 <sup>1</sup> The declarations in this category are those from Richard Cook, Mark Monroe, Greg  
 26 Morgenson, Preston Partain, Edward Spencer, Jim Spadafore, Donald Trgovich, and  
 Manual Zuniga.

1 To establish a prima facie case of retaliation under applicable state and  
 2 federal law, the Plaintiff must show that (1) he was engaged in a protected activity,  
 3 (2) his employer subjected him to adverse employment action, and (3) there is a  
 4 causal link between the protected activity and the employer's action See, e.g.,  
 5 Villiarmino v. Aloha Island Air, Inc., 281 F 3d 1054, 1064 (9th Cir 2002), Weeks v  
 6 Harden Mfg Corp., 291 F 3d 1307, 1311 (11th Cir 2002), Francom v Costco  
 7 Wholesale Corp., 98 Wn App 845, 862, 991 P 2d 1182 (2000)

8 Plaintiff's prima facie case is based on three fundamentally flawed  
 9 propositions of law First, Plaintiff erroneously suggests that his refusal to sign a  
 10 release of claims ("Release") in exchange for receiving certain post-termination  
 11 consideration constituted "protected activity " Second, Plaintiff erroneously argues  
 12 that Allstate subjected him to adverse employment action by conditioning its offer to  
 13 become an independent contractor agent on his signing the Release Third, Plaintiff  
 14 conveniently, but incorrectly, contends that he does not need to prove a causal link  
 15 between his protected activity and Allstate's actions None of these legal  
 16 propositions is supported by law or the facts of this case, which Plaintiff repeatedly  
 17 distorts and misreads

18 **A. Plaintiff Did Not Engage in Protected Activity.**

19 Plaintiff's prima facie case rests on the incorrect assumption that he engaged  
 20 in "protected activity" when he declined to sign the Release Although Plaintiff cites  
 21 numerous cases in support of this assertion, not one of them actually concludes that  
 22 an employee engages in protected activity by declining to sign a waiver, and no  
 23 court has ever reached that conclusion

24 Because there is no direct judicial support for his novel legal theory, Plaintiff  
 25 awkwardly turns to the National Labor Relations Act As a threshold matter,  
 26 Plaintiff's reliance on the NLRA to interpret the ADA is dubious and contrary to Ninth

1 Circuit precedent Plaintiff cites a Third Circuit decision, Fogelman v. Mercy  
 2 Hospital, Inc., as support for his theory, but he fails to disclose (except in footnote  
 3 15) that the Ninth Circuit and most other circuits have expressly adopted a different  
 4 framework (Title VII) for analyzing ADA retaliation claims Barnett v. U S Air, Inc.,  
 5 228 F 3d 1105, 1121 (9<sup>th</sup> Cir 2000) overruled on other grounds by U S Airways,  
 6 Inc v Barnett, 122 S Ct 1516, 1520 (2002) Consequently, in the Ninth Circuit, as  
 7 in most other circuits, Title VII, not the NLRA, provides the relevant framework for  
 8 evaluating ADA retaliation claims Id.

9 Even if the NLRA were a relevant guide to interpreting Plaintiff's ADA  
 10 retaliation claim, the labor relations decisions cited by Plaintiff are inapposite, as  
 11 none involve any discussion of a waiver See A&D Davenport Transp, Inc., 256  
 12 NLRB 462, 464-65 (1981), Prince Trucking Co., 283 NLRB 806, 807-08 (1987) In  
 13 these cases, the NLRB did not consider whether declining to sign a waiver  
 14 constituted protected activity under the NLRA <sup>2</sup>

15 Plaintiff does cite a lone labor relations decision involving a waiver of sorts,  
 16 however, Plaintiff misreads the court's ruling in that case In Retlaw Broadcasting  
 17 Co v NLRB, 53 F 3d 1002 (9<sup>th</sup> Cir 1995), the court considered the case of a union  
 18 employee who was asked to sign an agreement in which he waived his right to  
 19 grieve any future termination of his employment Id. at 1006 Because he was  
 20 being asked to waive the right to challenge future actions by his employer, the  
 21 NLRB and the court ruled that by declining to sign the agreement, the employee  
 22 was engaging in the protected activity of asserting his rights under the collective  
 23 bargaining agreement Id. at 1006-07.

24 <sup>2</sup> In Davenport, the NLRB did review a document that was designed to eliminate the  
 25 employer's liability, however, that document cannot properly be characterized as a waiver  
 26 The employer in Davenport required the employees to make false admissions of fact, and it  
 intentionally withheld information as to the potential consequences of signing the document  
Davenport, 256 NLRB at 463

1 Unlike the purported settlement in Retlaw, Allstate's Release did not include  
 2 a waiver of future claims (See Plaintiff's Exhibit ("P Ex ") 3 ) Nothing in Retlaw  
 3 suggests that Temple engaged in protected activity by declining to sign a release of  
 4 existing claims in exchange for substantial post-termination benefits To the  
 5 contrary, the Court's discussion in Retlaw establishes that an offer to settle an  
 6 existing dispute in exchange for valid consideration is permissible under the NLRA

7 Lacking any case law support, Temple asserts that "logic" requires a finding  
 8 that an employee's refusal to waive a claim is protected activity Far from being  
 9 logical, this argument flies in the face of common sense and well-established case  
 10 law recognizing the value and utility of properly drafted releases If Temple's  
 11 argument were to prevail, any employer who sought a release in exchange for an  
 12 offer of severance or in settlement of a disputed discrimination claim would risk  
 13 being accused of retaliation Such a result would thwart rather than advance public  
 14 policy

15 Federal courts, including the Ninth Circuit, repeatedly have acknowledged  
 16 that an employer's offer or exchange of consideration for an employee's release of  
 17 employment discrimination claims is both commonplace and consistent with public  
 18 policy See e.g., Blackwell v Cole Taylor Bank, 152 F.3d 666, 669 (7th Cir 1998),  
 19 Stroman v West Coast Grocery Co., 884 F 2d 458, 460-61 (9th Cir 1989),  
 20 Allstate's Motion for Summary Judgment at 12-13

21 Plaintiff ignores this precedent and misrepresents applicable law in arguing  
 22 that Allstate's use of a waiver is a form of "illegal coercion" For example, Plaintiff  
 23 cites Callen v Pennsylvania R Co., 332 U S 625, 630-31 (1948), for the  
 24 proposition that Allstate's waiver was "simply a device used to exempt the company  
 25 from liability out of the forced conversion " That very argument was made in Callen  
 26 and expressly rejected by the Court

1 It is obvious that a release is not a device to exempt  
2 from liability but is a means of compromising a claimed  
liability and to that extent recognizing its possibility

3 Callen, 332 U S at 630-31 So in the only decision cited by Plaintiff in which a court  
4 actually considered whether it was proper for an employer to use a waiver, the U S  
5 Supreme Court ruled that it was "obvious" that the employer's use of a release of  
6 claims was proper

7 While Temple would like to have his cake and eat it too by taking the benefits  
8 Allstate offered while also retaining his right to sue, he has failed to cite any case  
9 that supports his claim that Allstate acted unlawfully in requiring him to make a  
10 choice, or that the economic choice he made was protected activity For the  
11 foregoing reasons, Temple has not shown that he engaged in "protected activity"  
12 and thus has not established the first element of his prima facie claim of retaliation  
13 For this reason alone, his motion for partial summary judgment should be denied,  
14 and judgment entered for Allstate

15 **B. Allstate's Conditional Offer of Enhanced Post-Termination Benefits**  
16 **Was Not An Adverse Employment Action.**

17 Plaintiff's retaliation claim also fails because he cannot establish the second  
18 element of a prima facie case that Allstate subjected him to an "adverse  
19 employment action" because he engaged in protected activity Plaintiff argues that  
20 Allstate's offer to become an independent contractor agent was simply a form of  
21 continued employment, and that conditioning "continued employment" on a waiver  
22 is a form of adverse action. Temple's factual and legal conclusions are wrong

23 Plaintiff's argument misleadingly argues that he and other agents had a right  
24 to "continue to work" with Allstate Plaintiff had no legal right to continue with the  
25 company as an exclusive agent independent contractor The contracts of Plaintiff  
26 and the other agents were terminable at will by either party (See P Ex 5 at § 11 )

1 It is undisputed that Allstate terminated the employment of all of its employee  
 2 agents (as it was entitled to do under the employment agreement) and offered each  
 3 of them four post-termination options under the Program<sup>3</sup> Three of the four options  
 4 resulted in the agent's severing all ties to the company (either of the severance pay  
 5 options or the option under which the agent converted and sold the book of  
 6 business) The fourth option, which is the only one acknowledged in Temple's  
 7 Motion, allowed agents who signed the Release to receive a bonus, forgiveness of  
 8 debt, and to become independent contractor agents under a new contract, which  
 9 differed significantly from the contracts they had as employees (Declaration of  
 10 Barry Hutton in Opposition to Plaintiff's Motion for Summary Judgment ("Second  
 11 Hutton Decl ") at ¶ 5 )<sup>4</sup> Agents who elected this option not only entered into a new  
 12 independent contractor relationship, but received a one-time bonus, forgiveness of  
 13 debt, and an opportunity to gain an economic interest in their book of business that  
 14 they did not have as employees Id While Allstate had agreed to allow employee  
 15 agents to convert to independent contractors previously, they did not previously  
 16 receive a bonus, forgiveness of debt upon conversion, or the same rights to gain an  
 17 economic interest Id In addition, Temple has no evidence that employee agents  
 18 previously had a right to convert Temple offers the declaration of Barry Koehler as

19 <sup>3</sup> The Isbell declaration that Temple relies on does not support his claim Allstate  
 20 terminated the employment of all agents, whether or not they signed a waiver (Declaration  
 21 of Barry Hutton in Support of Allstate's Motion for Summary Judgment ("Hutton Decl ") at ¶  
 22 16 and Ex B ) The letter Isbell cites from her manager does not prove otherwise, and in  
 23 any event, it undisputedly did not go to Temple, who worked in a different market and did  
 24 not receive any information except the written materials referenced in Hutton's declaration  
 25 (Temple Dep 470 10-12, 471 3-15, 480 3-8 and 18-24 )<sup>3</sup> Because Plaintiff submitted  
 26 copies of the entire transcripts of every deposition to which they cite, Allstate will not re-  
 submit copies of the depositions cited in this Opposition Deposition exhibits are attached  
 to the Declaration of Karen Jones in Opposition to Plaintiff's Motion for Partial Summary  
 Judgment ("Second Jones Decl ")

<sup>4</sup> Among other things, the R3001 Independent Contractor Agreement gave agents broader  
 flexibility and control over how to run their businesses, hire their staffs, and spend their  
 money It also gave them a valuable economic interest in their book of business

1 the sole support for his claim that this offer was nothing more than continued  
 2 employment. However, Koehler's declaration neglects to mention that in addition to  
 3 signing an entirely new contract, when he converted he received a cash bonus,  
 4 forgiveness of certain debts, and the right to gain an economic interest in his book  
 5 of business. (See P Ex 1 at ALL 000469, 000482.) Therefore, the record clearly  
 6 shows that Allstate's conditional offer was not for continued employment, but for  
 7 significant benefits and a new contractual relationship, to which the terminated  
 8 employee agents were not otherwise entitled.

9 Courts in analogous cases have rejected Plaintiff's argument that  
 10 conditioning an offer of a new or different position on a waiver constitutes adverse  
 11 action. In Graves v. Fleetguard, Inc., 1999 WL 993963 at \*4-5 (6<sup>th</sup> Cir. 1999), the  
 12 court affirmed summary judgment in favor of an employer who laid off an employee  
 13 as part of a reduction-in-force and then offered him a new position on the condition  
 14 that he drop his pending discrimination charges. Rejecting the employee's  
 15 argument that the conditional offer of employment was an adverse action, the court  
 16 reasoned that the employer was under no obligation to transfer or rehire. Thus, it  
 17 deemed the conditional proposal of employment to be a legitimate settlement offer  
 18 designed to benefit both parties, not an adverse action. See also Hansen v.  
 19 Vanderbilt Univ., 961 F. Supp. 1149, 1153 (M.D. Tenn. 1997) (dismissing retaliation  
 20 claim on summary judgment and holding that requiring an employee to choose  
 21 between pursuing an EEOC claim and a settlement payment was not "adverse  
 22 action"), Longworth v. National Supermarkets, Inc., 1986 WL 8711 (E.D. Mo. 1986)  
 23 (dismissing plaintiff's retaliation claim and holding that employer's refusal to  
 24 reinstate her unless she withdrew grievance and EEO charge was not retaliation),  
 25 Penny v. Winthrop-University Hosp., 883 F. Supp. 839 (E.D.N.Y. 1995) (holding that  
 26 offer to reinstate terminated employee in exchange for her agreement to, among

1 other things, waive and release claims was not an adverse employment action)

2 Temple's sole support for his argument that he experienced adverse  
3 employment action is Hishon v. King & Spalding, 467 U.S. 69 (1984) (Plaintiff's  
4 Motion at 22 ) In Hishon, a law firm allegedly engaged in unlawful discrimination by  
5 withholding consideration for partnership on the basis of gender. The employer  
6 argued that the denial of partnership was not an adverse employment action. The  
7 Court disagreed, concluding that becoming a partner was the expected career path  
8 for an associate. "the opportunity to become partner was part and parcel of an  
9 associate's status as an employee at respondent's firm." Id. at 76.

10 This case is different from Hishon because becoming an independent  
11 contractor agent was not part of a natural progression or expected career path for  
12 employee agents. Neither of the critical factors that the Hishon court relied on is  
13 present here. First, in determining that consideration for partnership was a term or  
14 condition of employment, Hishon relied on the fact that the firm "explicitly used the  
15 prospect of ultimate partnership to induce young lawyers to join the firm." Id. In  
16 contrast, Allstate did not use the opportunity to become an independent contractor  
17 Exclusive Agent to induce Temple to become an employee agent, at the time  
18 Allstate hired Temple, the independent contractor program did not exist. (Hutton  
19 Decl. at ¶ 11, Deposition of John S. Temple ("Temple Dep.") at 31:5-32:13.)  
20 Moreover, according to Temple, becoming an independent contract agent likely  
21 would not have been an inducement, as he claims that few employee agents even  
22 wanted to become Exclusive Agents. (Plaintiff's Motion at 29.)

23 Second, the Hishon decision emphasized that lawyers outside of the firm  
24 were not routinely considered for partnership, employment as an associate was  
25 almost the exclusive means of becoming a partner at the firm. Id. Allstate, in  
26 contrast, routinely recruited Exclusive Agents from outside the employee agent

workforce (Second Hutton Decl at ¶6 ) In contrast to Hishon, at the time the Program was introduced, many Independent Contractor agents had started with Allstate under that contract, rather than as employee agents like Temple (Second Hutton Decl at ¶ 6 )

Unlike the offer of partnership in Hishon, the offer to become an independent contractor was neither an inducement to become an agent, nor an expected or customary career progression for employee agents like Temple As a result, Allstate's decision to condition this separate business relationship on the plaintiff's waiver of claims was not an "adverse employment action " The failure of an employer to provide consideration to an individual who does not execute a release does not constitute an adverse action Otherwise, an adverse action would arise in every case where an employee declines an offer of settlement because the employee does not want to execute a release

**C. Temple Cannot Establish Retaliation Because He Has No Evidence of Any Causal Link Between Any Protected Activity and Allstate's Alleged Adverse Action.**

Plaintiff mistakenly cites EEOC v Board of Governors, 957 F 2d 424 (7<sup>th</sup> Cir 1992) as support for the proposition that he does not have to prove that Allstate implemented Preparing for the Future for retaliatory reasons Plaintiff's reliance on Board of Governors is misplaced for two reasons

First, the court in Board of Governors considered an employer's response to an employee who had engaged in actual protected activity However, as described above, Temple has no support in law or fact for his claim that he engaged in protected activity by not signing the Release

Second, Board of Governors is distinguishable because the policy in question there automatically terminated an employee's pre-existing contractual right to use the grievance procedure established by a collective bargaining agreement to

1 pursue discrimination claims as soon as the employee opted to pursue the  
 2 discrimination claim outside the grievance process. In other words, an employee  
 3 who undertook what was clearly protected activity—complaining about  
 4 discrimination—subsequently suffered adverse action (the loss of a preexisting  
 5 contractual right). In contrast to the Plaintiff in Board of Governors, Temple did not  
 6 lose any preexisting right by refusing to sign the Release. (Hutton Decl. at ¶ 19)  
 7 Board of Governors does not apply under the facts of this case. See U.S. v. New  
 8 York City Transit Auth., 97 F.3d 672, 679 (2<sup>nd</sup> Cir. 1996).

9 In its Motion for Summary Judgment, Allstate offered evidence establishing  
 10 its legitimate business reasons for implementing the Preparing for the Future  
 11 Program. (Hutton Decl. at ¶¶ 20-21, Allstate's Motion for Summary Judgment at 6-  
 12 7). In his Motion, Temple offers no evidence to refute Allstate's explanation or to  
 13 even remotely suggest that Allstate implemented Preparing for the Future with any  
 14 consciousness of Steve Temple or for the purpose of retaliating against him or any  
 15 other agent who had asserted claims.

16 Temple's so-called evidence that Allstate "needed to clean house to end its  
 17 war with its agents," evaporates upon close examination. For example

- 18 ■ Temple claims that Allstate was "embroiled in litigation filed by its employees"  
 19 and cites Allstate's 1995 Annual Report as support for that proposition  
 (Plaintiff's Motion at 27.)
  - 20 ➤ In fact, the portion of the annual report cited by Plaintiff refers to proposed  
 21 settlement of class-action litigation solely involving California law, which  
 22 plainly does not apply to Temple. (P Ex. 38 at 2.) That litigation was  
 resolved in January 1996, almost four years before Allstate announced  
 Preparing for the Future. (P Ex. 11 at 1)
- 23 ■ Temple also cites to news articles describing conflicts between Allstate and  
 24 some agents. (Plaintiff's Motion at 29.)
  - 25 ➤ These articles were published in 1995, four years before Preparing for the  
 Future was announced
- 26 ■ Temple claims that Allstate's failure to withdraw the Preparing for the Future

1 Program following an EEOC decision in May 2000 somehow evidences  
2 retaliatory intent (Plaintiff's Motion at 29 )

3 ➤ The EEOC's decision was made six months after Preparing for the Future  
4 was announced, and only one month before the Program was to be  
5 completed (See Allstate's Motion for Summary Judgment at 4 )

6 ▪ Temple claims that "his managers agreed no other employee agent made as  
7 many requests for accommodation, overtime, or raised other employee rights  
8 concerns," relying on excerpts from the depositions of Rollie Poulter and Stuart  
9 Parsons (Plaintiff's Motion at 30 )

10 ➤ The deposition testimony cited by Temple does not support his assertion  
11 Poulter testified only that he recalls talking with Parsons about Temple in  
12 connection with budget matters Parsons testified only that Temple tended to  
13 question every Allstate company policy, no matter what the subject There is  
14 no mention whatsoever of disability or overtime issues, or any other specific  
15 "employee rights " (See Deposition of Rollie Poulter ("Poulter Dep ") at  
16 79 12-19, Deposition of Stuart Parsons ("Parsons Dep.") at 95 7-21 )

17 ▪ Temple claims that he "initiated a national investigation by the Department of  
18 Labor in 1999," which was widely discussed amongst management and Human  
19 Resources (Plaintiff's Motion at 30 )

20 ➤ The only support he provides is an excerpt of the deposition of Cindy Oster,  
21 an Allstate HR employee, who testified that she could not recall such an  
22 investigation, though it was possible an investigation was going on  
23 (Deposition of Cindy Oster ("Oster Dep ") at 55 8 – 57 14 )

24 ▪ Temple claims "it was undisputed that managers also discussed Steve Temple's  
25 multiple requests for overtime compensation," citing an excerpt from the  
26 deposition of Debbie Cooper (Plaintiff's Motion at 30 )

➤ In that passage, Cooper says only that at some point she became aware that  
Temple had requested overtime pay (Deposition of Debbie Cooper  
("Cooper Dep ") at 115 25 – 116 6 )

▪ Relying on inadmissible assertions by two fellow agents, Temple claims that his  
complaint to the Department of Labor was "the talk of the town" (citing the  
declaration of Steve Crosby) and that his "leadership and advocacy was a threat  
to Allstate" (citing the declaration of Gail Carter) (Plaintiff's Motion at 30-31 )

➤ Crosby's statement is not based on personal knowledge and should be  
stricken The Carter declaration only states that "it is logical to think that  
Temple presented a risk" that if Allstate had to give him permission to do  
things, it would also have to give other agents the same permission (Carter  
Decl at ¶ 59 )

▪ Finally, Temple claims that Allstate launched a fraud investigation against him  
and "stalked him" because the company was threatened by his "leadership and  
advocacy " (Plaintiff's Motion at 31 )

➤ Although it is true that Allstate investigated a claim made by Temple's in-laws, the claims adjuster who asked for the investigation has offered un rebutted testimony that the request had nothing to do with Temple's employment. The adjuster testified that he had never heard of Temple before becoming involved in the in-laws' claim, that he knew nothing about Temple's protected activity, had never met or talked with Temple's managers, and that his reasons for requesting the investigation were based on the conduct of Temple's in-laws, not Temple himself (Hutchinson Dep at 117 5 – 121 16 )

Plaintiff cannot establish any link between his own protected activity and Allstate's decision to use the Release. Plaintiff argues that his managers looked upon him with disfavor, and that this provided them with a motive to retaliate against him for his protected activities. Even if this were true (and it is not), Allstate Vice President Barry Hutton has confirmed that the decision to implement Preparing for the Future, including the decision to use the Release, was made by managers at Allstate's Home Office, and that Temple's managers in the Seattle region were not involved (Hutton Decl at ¶ 20 )

In summary, even if Plaintiff's many inflammatory accusations were accepted as truth, he has failed to establish any connection between his activities and Allstate's Preparing for the Future decision makers. As described in detail in Allstate's Motion for Summary Judgment, Allstate had compelling business reasons to terminate its employee agent programs, and its use of the Release was consistent with standard practices of employers who offer enhanced post-termination benefits. Allstate's Motion for Summary Judgment should be granted, and Plaintiff's Motion denied for this additional reason.

#### **IV. ALLSTATE, NOT PLAINTIFF, IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S DISPARATE IMPACT CLAIM.**

##### **A. Plaintiff's Disparate Impact Claim Is Conclusively Rebutted By Allstate's Undisputed Evidence.**

To present a prima facie case of disparate impact discrimination, Temple

1 must demonstrate (1) a specific employment practice that (2) causes a significant  
 2 discriminatory impact Paige v California, 2002 WL 1579101 at \*2 (9th Cir July 18,  
 3 2002) As the court explained in Paige

4 In evaluating the impact of a particular process, we must  
 5 compare the group that "enters" the process with the  
 6 group that emerges from it The best evidence of  
 7 discriminatory impact is proof that an employment  
 practice selects members of a protected class in a  
 proportion smaller than in the actual pool of eligible  
 employees

8 Id. at \*3 The Ninth Circuit's comments emphasize that analysis is used to  
 9 determine whether a selection process selects candidates from a protected group at  
 10 a different rate than from all other groups of individuals

11 Plaintiff claims he was a member of three protected classes (1) employees  
 12 40 and older, (2) disabled employees and (3) employees who engaged in protected  
 13 activity Assuming for purposes of this Opposition that Plaintiff's assertion is  
 14 correct,<sup>5</sup> Allstate has produced conclusive statistical evidence that the Program did  
 15 not discriminate against any of these protected groups Under its Preparing for the  
 16 Future Program, Allstate terminated the employment of 100% of its employee  
 17 agents, including (1) 100% of the agents over and under 40, (2) 100% of the agents  
 18 with or without disabilities, and (3) 100% of the agents who did and did not engage  
 19 in protected activity (Hutton Decl in Support of Allstate's Motion For Summary  
 20 Judgment at ¶ 16 ) Likewise, it is undisputed that Allstate made the same  
 21 conditional offer of post-employment benefits to all of its agents Plaintiff has no  
 22 evidence—statistical or otherwise—showing that the practice he is challenging  
 23 affected a higher percentage of age-protected or disabled agents than were in the

24  
 25 <sup>5</sup> Allstate rejects plaintiff's assertion that he was a qualified individual with a disability  
 26 Further, and for reasons fully set forth in Allstate's Motion for Summary Judgment, there is  
 no support for plaintiff's assertion that "individuals who engaged in protected activity"  
 constitutes a protected class See Allstate's Motion for Summary Judgment at 15-17

1 pool Consequently, Plaintiff cannot prove disparate impact and Allstate, not  
2 Plaintiff, is entitled to summary judgment on this claim.

3 **B. Plaintiff has No Legal Support for his Novel Disparate Impact Theory.**

4 Plaintiff's claim is based on the premise that Allstate's use of the Release  
5 had a disparate impact on Plaintiff's protected classes because these employees  
6 had more potential employment discrimination claims than individuals outside those  
7 classes This argument has been expressly rejected by at least two federal courts  
8 of appeal

9 In DiBiase v. SmithKline Beecham Corp., 48 F 3d 719 (3<sup>rd</sup> Cir 1995), the  
10 employer implemented a reduction-in-force and offered all employees enhanced  
11 severance benefits in exchange for a waiver Id. at 722 The trial court ruled that  
12 "older terminated workers have more accrued claims to give up than younger  
13 workers Thus, in order to comply with the ADEA, SmithKline should have given  
14 extra consideration to older workers because by signing the release they were  
15 giving up more claims than younger workers " Id. at 727 The Third Circuit rejected  
16 this reasoning outright

17 It is impossible to examine SmithKline's policy and conclude  
18 that on its face it treats older employees differently than  
19 younger employees the policy does not classify persons  
20 on the basis of age On the contrary, the plan is an  
21 archetypical example of a facially non-discriminatory policy  
SmithKline made the expanded package available to all  
employees willing to sign the release, regardless of age.  
SmithKline did not require employees to waive only ADEA  
claims, but to waive all claims

22 Id. at 727 See also Griffin v. Kraft General Foods, Inc., 62 F 3d 368, 374 (11<sup>th</sup> Cir  
23 1995) (adopting the Third Circuit's disparate treatment analysis under similar  
24 circumstances) The court also concluded that, since SmithKline's use of the  
25 release did not constitute disparate treatment, no claim should be viable under a  
26 disparate impact theory, because such a claim would improperly be based on the

theory that SmithKline would have been required to engage in disparate treatment in order to avoid disparate impact Id. at 731-32

There is no basis in either law or equity for the proposition that an employer's use of a waiver as a means to settle employment claims can be the basis for a disparate impact claim.<sup>6</sup> Allstate's use of the Release involves circumstances that are virtually identical to those considered in DiBiase. For the reasons articulated by the Third Circuit and embraced by the Eleventh Circuit, Plaintiff's request for summary judgment on his disparate impact claim should be denied.

**V. ALLSTATE, NOT PLAINTIFF, IS ENTITLED TO SUMMARY JUDGMENT ON HIS DISABILITY CLAIM.**

Temple's motion for summary judgment on his disability claim is likewise ill-conceived. The undisputed facts (including Temple's own admissions) support summary judgment in favor of Allstate, not Temple. (See Defendant's Motion for Summary Judgment at 29-44.) Setting aside all other issues, and assuming all relevant facts in Plaintiff's favor, Plaintiff's Motion must be denied and judgment entered for Allstate because complying with Agency Standards was an essential function of an agent's job, and Temple admits that he could not comply with the Standards. On this basis alone the Court can resolve Temple's disability claim and need not consider Plaintiff's other contentions. However, Allstate, not Temple, is entitled to summary judgment for additional reasons: (1) Temple's condition is undisputed except during the latter half of 1999 and did not qualify as a "disability" or otherwise entitle him to protection of the disability laws; (2) Temple did not give Allstate notice of his alleged disability and/or need for accommodation, and (3) even

<sup>6</sup> Plaintiff's citation to Scheer v. Woodland School Community Consolidated Dist. No. 50, 867 F.2d 974, 980 (7<sup>th</sup> Cir. 1988) is improper, as that case concluded only that an employer's sick leave policy may have a disparate impact when it established different eligibility criteria for individuals in the protected class (pregnant women). There is no different eligibility criteria at issue here.

1 if Temple had properly given notice of a need for accommodation, Allstate already  
 2 was providing one of the accommodations he now claims should have been made  
 3 and was not required to provide the other as a matter of law Temple's arguments in  
 4 his motion for summary judgment do not create a genuine issue of material fact as  
 5 to these arguments and certainly do not establish that Temple is entitled to  
 6 summary judgment

7 **A. Temple was Not a "Qualified Individual with a Disability" Because he**  
 8 **Could Not Meet the Agency Standards.**

9 To establish a prima facie case of failure to accommodate under the ADA, a  
 10 plaintiff must prove that (1) he or she is disabled within the meaning of the ADA; (2)  
 11 he or she is qualified to perform the essential functions of the job, with or without  
 12 reasonable accommodation, and (3) the employer failed to accommodate the  
 13 disability See Kennedy v Applause, 90 F 3d 1477, 1481 (9th Cir 1996) The test  
 14 under the WLAD is similar Hill v BCTI Income Fund, 144 Wn 2d 172, 193, 23 P 3d  
 15 440 (2001) A "qualified individual with a disability" is a person who, with or without  
 16 reasonable accommodation, can perform the essential functions of [his or her] job  
 17 Weyer v Twentieth Century Fox Film Corp., 198 F 3d 1104, 1108 (9th Cir 2000)<sup>7</sup>  
 18 Temple cannot establish that he was a "qualified individual with a disability" during  
 19 the time period at issue If, as Temple claims, he could not meet the Agency  
 20 Standards because he needed to be out of the office for appointments and it was  
 21 impossible for him to find or afford licensed staff, then he could not perform the  
 22 essential functions of his job (See Allstate's Motion for Summary Judgment at 42 )

23 Temple's sole argument in support of his claim that he was a qualified  
 24 individual with a disability is that meeting Agency Standards was not an essential

25 \_\_\_\_\_  
 26 <sup>7</sup> Similarly, the WLAD only protects individuals with a disability where the disability does not  
 "prevent the proper performance" of the employee's job RCW 49 60 180

1 function of the agent's job. However, the evidence he presents does not create a  
 2 genuine issue of fact, much less entitled him to judgment as a matter of law. First he  
 3 offers evidence that he and a few other agents did not believe the Standards were  
 4 necessary. However, an employee's independent opinion about whether a task is  
 5 an essential function is not relevant to determining whether a function is essential.  
 6 See 42 U.S.C. § 12111(8), 29 C.F.R. § 1630.2(n)(3). By contrast, an employer's  
 7 judgment about the importance of the task is a relevant factor. 29 C.F.R. §  
 8 1630.2(n)(i). The Agency Standards were adopted because Allstate determined that  
 9 it needed to establish consistent countrywide standards to meet competitive  
 10 pressures and customer demands. (See Hutton Decl. at ¶¶ 21-22.) Allstate  
 11 considered it critical that each of its agents meet these standards so that it could  
 12 both advertise and deliver the high level of service that its customers deserved and  
 13 market conditions demanded. (Id. at ¶ 23.) The standards applied to all agents  
 14 (Id., Temple Dep. at 222-19 – 23, 223-13-17.) Under applicable law, compliance  
 15 with the Standards was an essential function of the agent's job. (See Allstate's  
 16 Motion for Summary Judgment at 43-44.)

17 Temple also argues that that compliance with the Standards was not an  
 18 essential function because it was not mentioned in a written job description that was  
 19 prepared shortly after enactment of the ADA in 1992. (Deposition of Greg Lawrenz  
 20 ("Lawrenz 30(b)(6) Dep.") at 15-20 – 16-5.) This argument is another red herring.  
 21 There is no dispute that when the Standards were implemented, Temple and other  
 22 agents were informed in writing of Allstate's expectation that agents comply with  
 23 them. (See Cooper Dep. at Ex. 7, Hutton Decl. ¶ 22.) Although the 1992 job  
 24 description was not updated after the Standards were implemented, Allstate  
 25 communicated repeatedly to agents its expectations that they meet the Standards  
 26 as part of their job duties—indeed, one of Temple's complaints is that his managers

1 repeatedly told him that he had to comply with the Standards (Lawrenz 30(b)(6)  
 2 Dep at 15 20 – 17 11 (agent job description included agency standards and other  
 3 requirements developed after the 1992 written description) )

4 Finally, Temple claims that compliance with the Standards was not essential  
 5 because Allstate sometimes made exceptions This claim contradicts Temple's  
 6 deposition testimony, in which he admitted that Allstate enforced the Standards  
 7 uniformly and that he was not aware of any exceptions (Temple Dep at 222 19-23,  
 8 223 13-17 ) His so-called evidence supporting a contrary proposition is not what he  
 9 claims it to be For example, the Morgensen declaration says the opposite of what  
 10 Temple claims, Morgensen states that until the Standards were implemented he  
 11 was able to come and go as he pleased (See Morgensen Decl. ¶ 17 ) Similarly,  
 12 the Cooper testimony cited by Temple does not state that an exception to the  
 13 standards was possible as Temple claims (Cooper Dep at 128 6-20.) In sum, the  
 14 evidence offered by Temple does not support his position, and he fails to cite any  
 15 relevant or supporting legal authority

16 Temple's assertions do not refute Allstate's evidence that compliance with  
 17 the Standards was an essential function of the agent's job Because Temple admits  
 18 that he could not meet those Standards, he was not a "qualified individual with a  
 19 disability " Accordingly, the Court should grant summary judgment in Allstate's  
 20 favor on Temple's disability claim and need not consider Plaintiff's other arguments

21 **B. Temple's Condition Did Not Qualify For Protection Under Disability**  
 22 **Laws During the Vast Majority of his Employment with Allstate.**

23 Even if the Court finds that meeting Agency Standards was not an essential  
 24 function of Temple's position, Allstate still is entitled to summary judgment on  
 25 Temple's disability claim With the exception of a short period in the latter half of  
 26

1 1999, the facts are undisputed as to Temple's condition. Even during the period  
 2 when the facts concerning his condition are disputed, Allstate--not Temple-- is  
 3 entitled to summary judgment for the reasons stated in Allstate's Motion for  
 4 Summary Judgment (and summarized above)

5 Because Temple's physical and mental condition varied during the time at  
 6 issue in this case, it is critical to review the record as it unfolded, rather than to blur  
 7 events and timeframes as Plaintiff has done

8 **1 Temple Was Not Disabled From November 1998 to April 1999.**

9 To establish the existence of a "disability" under the ADA, a plaintiff must  
 10 show that that he or she suffers from a recognized condition that "substantially limits  
 11 one or more . . . major life activities " Toyota Motor Mfg ., Kentucky, Inc v Williams,  
 12 534 U S 184, 122 S Ct 681, 686 (2002) (quoting the ADA, 42 U S C §  
 13 12102(2)(A)) Under the WLAD, a plaintiff must show that (1) he or she had a  
 14 sensory, mental or physical abnormality and (2) that abnormality had a substantially  
 15 limiting affect on the plaintiff's ability to do his or her job Pulcino v Federal  
 16 Express, 141 Wn 2d 629, 641 (2000) The facts are undisputed in Allstate's favor  
 17 with regard to Temple's condition during this period From November 1998 to April  
 18 1999, Temple was able to work without any restrictions, and there is no evidence  
 19 that his cardiac condition substantially limited any other major life activities  
 20 According to Temple's own doctors, he was able to work without restriction in  
 21 November 1998 (P Ex 16, Temple Dep. at 300 13-25 ) In later visits during  
 22 November 1998 and January 1999, Temple's cardiologist did not place any  
 23 restrictions on his ability to work. (Deposition of Dr John Petersen ("Petersen  
 24 Dep ") at 54 5-11, 56 15-25 ) Temple acknowledged in his deposition that he was  
 25 fully able to do his job when he returned to work after his heart attack. (Temple  
 26

1 Dep at 285 5-10 & 14-19 ) His application for disability benefits does not list the  
 2 onset of his disability as occurring until January 2000 (Temple Dep at 464 4-15,  
 3 Ex 26 ) From this evidence, Allstate, not Temple, is entitled to summary judgment  
 4 on his claim relating to this period, because Temple was not substantially limited in  
 5 any major life activities, or in his ability to work

6           2       **Temple Was Not a Qualified Individual With a Disability After**  
 7                   **January 2000.**

8           The facts also are undisputed in Allstate's favor with regard to the third  
 9 period of time at issue, because Temple was totally disabled beginning in January  
 10 2000 A totally disabled plaintiff cannot establish that he is a "qualified individual"  
 11 because there is no genuine issue of fact that he could have performed the job with  
 12 the proposed, or any other, accommodation Weyer, 198 F 3d at 1108-09 (9th Cir  
 13 2000), Kennedy, 90 F 3d at 1481-82

14           Temple's admissions and the testimony of his treating physicians establish  
 15 that he was not able to perform his job, with or without accommodation, from  
 16 January 2000 through June 2000 Temple himself declared in a May 2000  
 17 application for disability benefits that he first became unable to work on January 12,  
 18 2000 (Temple Dep at 464 4-15, Ex 26 ) He also admits that since that time, no  
 19 doctor has ever said that he was able to return to work, either with or without  
 20 accommodation (Id at 467 16-19, 469 1-5 ) Testimony and records from Drs  
 21 Walker and Geren also confirm that Temple was totally disabled as of early 2000  
 22 (Deposition of Franklin Walker ("Walker Dep ") at 14 12-13, 16 11-16, 17 15-16,  
 23 50 13-51 19, 52 5-11, 81 13-15, Geren Dep at 58 9-24, 67 20-25, Ex 9, 68 22 –  
 24 69 15 ) It is clear that Temple was not a "qualified individual with a disability" during  
 25 this time period, because he was not able to perform his job with or without  
 26 accommodation

3 **Whether Temple Was Disabled From May 1999 to December 1999**  
**is, at Best, Disputed.**

a Whether Temple Was Disabled Under the WLAD During the  
 Second Time Period is, at best, Disputed

The only period of time when there is any question about Temple's condition is the period from May – December 1999, when he was diagnosed with anxiety and depression but was able to continue working Temple argues that he was "disabled" under Washington law because his condition substantially limited his ability to work, and working made his condition worse At a minimum, there are genuine issues of material fact as to both of these arguments.

Temple contends that his depression and anxiety substantially limited his ability to work because he struggled to concentrate at work, found it difficult to transact business at the end of the day, sometimes nodded off at work, and sometimes cried in front of his customers Even taken at face value, these allegations do not establish as a matter of law that Temple's condition had a "substantially limiting effect on [his] ability to perform his job " In addition, the following evidence calls into question Temple's self-serving description of his condition

- Temple worked throughout this period without requesting or taking any time off for medical reasons other than to attend doctors' appointments, and Temple has no evidence that any health care provider recommended he miss work during this period (See Exhibit 26 to Temple Dep (Application for Disability Insurance Benefits and related documents) )
- Temple's wages actually increased between 1998 and 1999, from \$55,623 50 to \$56,644 98, suggesting that he was more successful at work in 1999 than in 1998 (See W-2 Forms for Temple from Allstate, copies attached as Exhibit 4 to the Declaration of Karen Jones in Support of Allstate's Motion for Summary Judgment ("Jones Decl ") )
- Dr Geren saw Temple on May 26, 1999, the first visit since Temple's heart problem in September 1998 Following that visit, Dr Geren completed Allstate's disability form on June 9, 1999 indicating that

1 Temple was not impaired (Deposition of Dr James Geren ("Geren  
2 Dep ") at 17 9-11, 34 5-15, Ex 4 )

- 3 ■ Dr Petersen saw Temple on July 19, 1999 and reported that he was  
4 "very satisfied" with his cardiac status and did not plan to see him until the  
5 fall Petersen did not see Temple again until May 26, 2000 (Petersen  
6 Dep at 62 10 – 63 2, 64 6-9, Ex 1 excerpt pp 1 and 3 )
- 7 ■ Temple did not see a mental health counselor until October 22, 1999 Dr  
8 Geren reported on September 1 that Temple "has not taken it upon  
9 himself" to schedule an appointment with a mental health counselor that  
10 Geren had recommended "way back in May " (Geren Dep at Ex 3  
11 excerpt page 51 )
- 12 ■ Dr. Geren saw Temple on November 12, 1999 and reported that "overall  
13 [Temple] feels he is doing better on Zoloft " (Geren Dep at Ex 3 excerpt  
14 page 47 )
- 15 ■ Temple was seen by a social worker on December 2, 1999, who  
16 observed that his blood pressure was lower, he was sleeping better, and  
17 "there seems to be slight improvement in his symptoms " (See records of  
18 Regina Zupnick, attached as Ex 4 to the Declaration of Karen Jones in  
19 Opposition to Motion for Summary Judgment ("Second Jones Decl ") )
- 20 ■ Although Temple reported anger and frustration towards Allstate during  
21 this period, he did not tell any health care provider that he was having  
22 trouble doing his job until the end of December when he requested and  
23 received a leave of absence (Geren Dep at Exs 6, 7 )

24 Additionally, there are factual disputes with regard to Temple's argument that  
25 his required medical treatments conflicted with his ability to be in the office First, as  
26 Temple acknowledges, Allstate's Agency Standards required only that licensed staff  
be present during office hours, Temple himself did not have to be in the office  
(Plaintiff's Motion at 3 ) Second, there are factual disputes about what medical  
treatments Temple's doctors actually prescribed and whether the prescribed  
treatment in fact interfered with Temple's ability to do his job Although Plaintiff  
makes various claims about the advice he allegedly received from Drs Geren and  
Petersen, the doctors were not nearly as specific as Temple would have the Court

1 believe When Dr. Geren first saw Temple on September 30, 1998, he did not  
 2 discuss specific steps that Temple needed to take for recovering from his heart  
 3 attack, and he did not even see Temple again until late May 1999 (Geren Dep. at  
 4 12 17-19, 17 9-11, 20 15-23 ) After the May 1999 visit, Dr. Geren advised Allstate  
 5 that Temple was not impaired, and indicated only that he needed to participate in a  
 6 cardiac rehabilitation program and stress reduction classes "during the work week "  
 7 (Geren Dep. at Ex. 4 ) In his deposition, Dr. Petersen could not remember whether  
 8 he told Temple in early November 1998 that he could only work certain hours or that  
 9 he needed to leave the office (Petersen Dep. at 30 7 – 31 4 )<sup>8</sup> With respect to the  
 10 structured cardiac rehabilitation program, Dr. Petersen could not recall whether he  
 11 recommended a particular program to Temple (Id. at 36 1-9 ) Temple has  
 12 presented no evidence that anyone ever informed Allstate that Temple needed to  
 13 attend a specific rehabilitation program that offered classes only during the day

14 Finally, there is a factual dispute with regard to Temple's allegation that  
 15 working worsened his condition. In support of this contention, Temple relies  
 16 primarily on the report of Dr. Andrea Jacobson, the expert Temple retained to testify  
 17 on his behalf in this lawsuit. Notably, Dr. Jacobson did not even see Temple until  
 18 June 10, 2002, more than 17 months after the timeframe in question and after  
 19 Temple had filed suit. To the extent Dr. Jacobson offered any opinion regarding  
 20 Temple's condition in the latter half of 1999, she relied on reports of other health  
 21 care providers, none of whom recommended at the time that Temple miss work or  
 22 indicated that work was causing his condition to worsen. Moreover, Dr. Jacobson's  
 23 report itself raises a number of factual disputes about whether it was work or

24 \_\_\_\_\_  
 25 <sup>8</sup> Temple quotes this same passage as support for the claim that his doctors "expected him  
 26 to attend regular doctor's appointments, mental health therapy, and take time away from  
 the office to reduce stress and anxiety " (Plaintiff's Motion at 8 ) That assertion is a gross  
 mischaracterization of Dr. Petersen's testimony

1 something else that caused the alleged worsening of Temple's condition  
 2 Specifically, Dr Jacobson identifies a number of stressors that "might have  
 3 contributed to [Temple's] marked decline," including his heart attack in September  
 4 1998, stress from having his wife's family move in with his family during July 1999,  
 5 his mother's failing health, dealing with repeated sexual assaults that he  
 6 experienced years earlier, and other medical problems (See P Ex 15 at 14-15 ) In  
 7 addition, Allstate's expert disputes Temple's claim on this point and questions Dr  
 8 Jacobson's assessment of the cause of Temple's condition (See Report of Dr  
 9 Gerald Rosen, attached as Exhibit 5 to the Second Jones Decl )

10 There is also significant evidence in the record that Temple's own habits and  
 11 decisions caused or contributed to his declining health When Dr Petersen saw  
 12 Temple on January 29, 1999, he was not engaged in as much exercise as Petersen  
 13 would have liked (Petersen Dep 56 3-10 ) Months later, when Dr Geren saw  
 14 Temple on May 26, 1999, Temple apparently was still not getting the exercise  
 15 Geren believed was important (Geren Dep at 32 1-7 ) Temple has offered only  
 16 vague descriptions of any attempt he made to get the physical exercise his doctors  
 17 felt he should have Temple claims he was walking two miles two or three times  
 18 each week, but cannot remember when that was (Temple Dep at 278 9-21 )  
 19 Temple also claims he visited a health club after work, but could not recall even  
 20 approximately how many times a week he went (Id at 316 7-317:5 ) Even after  
 21 he left Allstate and presumably had more free time, Temple has never enrolled or  
 22 participated in a cardiac rehabilitation program (Id at 454 7-25 )

23 b Whether Temple Was Disabled Under the ADA During the  
 24 Second Time Period is, at Best, Disputed

25 There also are factual disputes as to whether Temple was disabled under the  
 26 ADA during the latter half of 1999 As described above, Temple's evidence that he

1 was substantially limited in his ability to work clearly is disputed

2 Temple's related argument that his condition created a "substantial limitation  
3 on the major life activity of working" is likewise flawed Temple argues that he was  
4 substantially limited in his ability to work because he had entered into a non-  
5 compete agreement with Allstate that prevented him from seeking employment  
6 elsewhere.<sup>9</sup> This argument lacks merit for three reasons First, the conclusion that  
7 Temple could only hold "entry-level positions" because he was bound by a non-  
8 compete is a massive logical leap and ignores any number of potential jobs  
9 available to Temple, such as those he previously held (See Temple Dep at 27 24  
10 – 28 5 (previous job selling cars) ) Second, even if the non-compete clause limited  
11 Temple's ability to work in certain jobs, that limitation does not support an argument  
12 that Temple's condition substantially limited him in the major life activity of working,  
13 because the non-compete, and not Temple's condition, created the limitation  
14 Third, any limitation imposed by the non-compete was not "substantial " The non-  
15 compete clause contained only a limited restriction on Temple's solicitation of  
16 Allstate customers for a period of just one year (See P.Ex 5 at ¶ 13 )

17 **C. Temple Did Not Give Allstate Adequate Notice of His Alleged Need for**  
18 **Accommodation.**

19 As described above, Allstate is entitled to summary judgment because  
20 Temple cannot show that he was a qualified individual with a disability who needed  
21 an accommodation Therefore, the Court need not reach the issue of whether  
22 Temple provided adequate notice of his alleged need for accommodation to  
23 Allstate However, should the Court determine that there is a fact issue as to

24  
25 <sup>9</sup> Although Plaintiff now contends that he was forced to remain in his job because of the  
26 non-compete provision and that he constantly asked Allstate for various accommodations,  
Plaintiff never requested an adjustment to his non-compete agreement as an  
accommodation See Declarations of Steve Temple and Lisa Temple

1 whether Temple was a "qualified individual with a disability" during the latter half of  
 2 1999, Allstate still is entitled to summary judgment because Temple did not provide  
 3 adequate notice of his alleged need for accommodation (See Allstate's Motion for  
 4 Summary Judgment at 38-40 ) Neither Temple nor his doctors informed Allstate  
 5 that his condition limited his ability to work, or that he needed a specific  
 6 accommodation

7 Temple now tries to claim that Allstate "absolutely" had notice of his  
 8 condition. However, the "evidence" he presents does not even establish a fact  
 9 issue precluding summary judgment in Allstate's favor. Although Temple boldly  
 10 claims that he made "myriad verbal requests for accommodation" to his managers,  
 11 in fact, none of the managers recalls any discussion where Temple informed them  
 12 that he needed the accommodations in question due to a disability or medical  
 13 condition. While Allstate concedes that it had notice of Temple's heart condition  
 14 and the information provided in the letters from his physicians, there is ample  
 15 evidence to refute his claim that Allstate knew that he needed the two  
 16 accommodations that Temple now claims it should have made to accommodate his  
 17 medical condition.

18 Temple first claims that he notified Allstate that he needed an exemption  
 19 from Agency Standards to take time off during the day so that he could attend  
 20 doctor's appointments and a particular cardiac rehabilitation program. The  
 21 evidence on this is in dispute.

- 22 ■ Temple admits that he cannot recall having ever missed a doctor's  
 23 appointment because of the Standards (Temple Dep. at 355 4-13 )
- 24 ■ When Temple wrote Greg Lawrenz in April 1999, he indicated his  
 25 belief that he needed an hour off during the day, but he could not  
 26 recall in his deposition whether that was based on any medical advice  
 (Temple Dep. 335 13-22 )
- Temple's doctors never informed Allstate that Temple needed time off

1 from work during the day for any reason. Dr. Petersen's November 5,  
 2 1998 letter said nothing about cardiac rehabilitation, and cleared  
 3 Temple for "full occupational responsibilities and duties starting  
 4 November 2, 1998" (Petersen Dep. at Ex. 4). The form Dr. Geren  
 5 completed for Allstate in June 1999 mentioned that Temple should be  
 6 "allowed to participate during the work week in an exercise rehab  
 7 program and stress reduction classes," but it did not say anything  
 8 about a specific program or time of day (Geren Dep. at Ex. 4).

- 9 ■ Temple has failed to produce any evidence indicating that anyone  
 10 ever informed Allstate of his alleged need to participate in a particular  
 11 program that was available only during the workday.

12 Several facts also contradict Temple's claim that he notified Allstate that he  
 13 needed to combine offices with another agent to accommodate his medical  
 14 condition. As described above, Temple's primary evidence on this point is his  
 15 allegation that he and his wife repeatedly requested this accommodation. In  
 16 contrast, Temple's managers repeatedly testified that they did not recall Temple  
 17 ever communicating that he needed an accommodation because of a disability  
 18 (See Deposition of Rob Fowler ("Fowler Dep.") at 70:17 - 71:12, Deposition of  
 19 Penny Watson ("Watson Dep.") at 21:22-25,<sup>10</sup> Parsons Dep. at 56:22 - 61:8). In  
 20 addition, there is substantial evidence that Temple did not indicate he was seeking  
 21 an accommodation when he expressed interest in combining offices with another  
 22 agent. Temple claims he asked Rollie Poulter (his manager at the time) to combine  
 23 offices with Helen Elwood so that he could go on daily walks, attend doctor's  
 24 appointments, and attend the cardiac rehabilitation program (Temple Decl. ¶ 40).  
 However, Poulter does not recall Temple telling him that sharing his office would  
 allow Temple to take daily walks and go to his doctor's appointments - or that daily  
 walks were medically necessary - and in fact does not recall Temple's reasons for  
 requesting to combine offices at all (Poulter Dep. at 63:14-22, 64:7-18, 68:5-8).

25 <sup>10</sup> Penny Watson recently married and is now Penny Jensen. For purposes of clarity, this  
 26 brief will refer to her deposition as the "Watson Dep.," although the deposition transcript  
 refers to Penny Jensen.

1 Poulter's testimony on this point contradicts Temple's story

2 Q. [D]id Steve Temple tell you that the reason that he  
3 wanted to combine offices with Barry Koehler was so  
4 that he could take daily walks?

5 A No

6 Q. Did he tell you that the reason that he wanted to  
7 combine offices with Barry Koehler was so he could go  
8 to doctors' appointments?

9 A No

10 Q. Did there ever come a time that you learned that the  
11 reason why Mr Temple wanted to combine offices with  
12 Mr Koehler was to take walks?

13 A No

14 Q. You never heard anything about taking walks?

15 A No

16 Q. And did you learn at any point the reason that he wanted  
17 to combine offices was to attend doctors' appointments?

18 A No

19 (Id at 70 19 – 71 12 )

20 Other managers testified in similar fashion For example, although Temple  
21 identifies Parsons as someone from whom both he and his wife specifically asked  
22 for an accommodation (Temple Decl ¶¶ 33-36), Parsons has no recollection of any  
23 such conversation (Parsons Dep at 60:17 – 62 17 ) In addition, Penny Watson  
24 was aware that Temple was trying to combine offices with another agent at some  
25 point, but did not recall how she learned that and gave no indication that Temple's  
26 efforts were based on a need for accommodation (Watson Dep at 177 1-10 )  
Greg Lawrenz stated that he did not know that Temple's reason for asking to  
combine offices was for accommodation. (Lawrenz 30(b)(6) Dep at 235 7-11,  
242 4 )

1 **D. Allstate Responded to Temple's Request for Accommodation**  
 2 **Appropriately.**

3 Temple did not give Allstate notice of his alleged disability or need for  
 4 accommodation until June 1999, and when Allstate received that notice, the  
 5 company promptly responded (See Allstate's Motion for Summary Judgment at 40-  
 6 42 ) Despite these undisputed facts, Temple claims that Allstate failed to respond  
 7 appropriately to his alleged request for accommodation as a matter of law because  
 8 it failed to (1) engage in the "interactive process," and (2) provide him with the  
 9 accommodations he allegedly requested Even if Temple were able to establish that  
 10 he had a disability and that he gave Allstate notice of his need for accommodation,  
 11 there are genuine issues of material fact on this element of his claim

12 1 **There is Ample Evidence That Allstate Engaged in the Interactive**  
 13 **Process With Temple.**

14 There is substantial evidence that Allstate engaged in an "interactive  
 15 process" with Temple once he actually requested an accommodation The one time  
 16 that Temple clearly indicated to Allstate that he needed an accommodation of his  
 17 condition was in his April 13, 1999 letter to Greg Lawrenz. Debbie Cooper, an  
 18 Allstate Human Resources Division Manager, reviewed the letter and prepared a  
 19 response (Cooper Dep at 118 8-22, Ex 2 ) In her review, Cooper could not tell  
 20 from Temple's letter what specific impairment Temple claimed to have that would  
 21 affect his job (Id at 114 3-12 ) Temple's letter attached a letter from Dr Petersen  
 22 dated March 31, 1999, which informed Allstate that Temple had a cardiac condition,  
 23 but the letter also stated that he had "stabilized from a medical perspective " (Id at  
 24 Ex 1 )

25 Upon receipt of these letters, Cooper requested additional information from  
 26 Temple and sent him an information form, which Temple asked Dr Geren to  
 complete (Cooper Dep at 118-8-22, Ex 2.) After receiving that form in June 1999,

1 Allstate wrote Temple a letter informing him that based on the information Dr Geren  
 2 provided, Temple was not a qualified individual with a disability (Id. at 143 22-25,  
 3 Ex 5 ) Allstate also informed Temple that even if he were disabled, he did not  
 4 require any adjustment to his work schedule to participate in an exercise or stress  
 5 reduction program, as Dr Geren recommended (Id.) In light of all this evidence,  
 6 Temple's contention that "Defendant concedes that it did nothing to accommodate  
 7 Mr Temple's disabilities" is patently false.

8 Once Allstate informed Temple that the information available indicated that  
 9 Temple was not disabled or in need of accommodation, it was up to Temple to  
 10 provide additional information if he or his physicians disputed Allstate's  
 11 understanding of the information provided by Dr Geren Allstate evaluated the  
 12 information Temple and his doctors provided and concluded that Temple did not  
 13 have a disability that required accommodation Allstate then informed Temple of its  
 14 conclusion, and Temple never provided any additional information <sup>11</sup> On this record,  
 15 Allstate fulfilled its duty to engage in an interactive process See *Louisegeed v Akzo*  
 16 *Nobel Inc.*, 178 F 3d 731, 735-36 (5th Cir 1999) (employer does not violate ADA  
 17 where employee forestalls the interactive process), *Beck v University of Wisconsin*  
 18 *Bd of Regents*, 75 F 3d 1130, 1137 (7th Cir 1996) (same) At the very least,  
 19 whether Allstate met its responsibilities is an issue for the jury See e.g., *EEOC v*  
 20 *Yellow Freight System, Inc.*, 253 F 3d 943, 958-59 (7th Cir 2001)

21 The record does not support Temple's claim that Allstate ignored his verbal  
 22 requests As described above, while Temple may have spoken with his managers  
 23 about combining offices with other agents, he did not tell them that he believed he

24 \_\_\_\_\_  
 25 <sup>11</sup> The only allegation regarding a response to Cooper's letter is the assertion in Temple's  
 26 declaration that he wrote to Cooper on August 23, 1999, again requesting an  
 accommodation That letter only requested that Cooper write to him on Allstate letterhead  
See Exhibit 9 to the Jones Decl

needed to combine offices as an accommodation of his condition (See Section V C, above ) In addition, when Temple made a request for accommodation, Allstate responded appropriately, asking for additional information from Dr Petersen evaluating Temple's request, and providing him with a response (See Section V D 1, above ) Finally, Temple's claim that Allstate "stonewalled and ignored Dr Petersen when he invited Allstate to contact him" is a mischaracterization of the record Heather Frasier, an Allstate Human Resources employee, wrote to Dr Petersen regarding Temple's cardiac condition and specifically sought his feedback regarding Temple's limitations, if any (See Frasier Dep at 62 17 – 68 17 ) Temple's allegation that Allstate "ignored his verbal requests" is meritless, and, at a minimum, is highly disputed

2        **Allstate Provided One of the Accommodations Requested by Plaintiff And Was Not Required to Provide the Other.**

Temple claims that Allstate failed to provide him with the accommodations he allegedly requested and that this failure was a violation of the ADA and the WLAD as a matter of law This claim is flawed because, even if Temple had a disability and had properly notified Allstate of his requests for accommodation, Allstate provided Temple with one of the accommodations at issue and was not required to provide him with the other as a matter of law (See Allstate's Motion for Summary Judgment at 40-42 ) For this additional reason, Allstate, not Temple, is entitled to summary judgment on his disability claim

The first accommodation Temple contends Allstate should have made is allowing him to close his office, so that he could attend a specific cardiac rehabilitation program as well as his doctor's appointments and reduce stress This accommodation already was being provided to Temple, because he could leave his office at any time as long as licensed staff was present Even if the accommodation

1 were not already available to Temple, there are factual disputes on at least two  
 2 aspects of this claim (1) whether Temple actually needed time off during the day,  
 3 and (2) whether Temple could not find or afford licensed staff to cover his office

4 Although Temple claims that the Agency Standards prevented him from  
 5 leaving his office for medical appointments, in his deposition, Temple could not  
 6 recall a single instance where he missed a doctor's appointment in order to ensure  
 7 compliance with the standards (Temple Dep at 355 4-13 ) Further, as explained  
 8 above, the record is unclear about whether Temple's doctors ever recommended to  
 9 Temple or anyone else that Temple needed to enroll in a specific cardiac  
 10 rehabilitation program None of the doctor's notes indicate that Temple needed to  
 11 attend a specific program (See P Exs 16 and 18 (at p 2), Geren Dep at Ex 4 )  
 12 Additionally, Dr Petersen admitted that Temple did not need to enroll in a specific  
 13 program to get the exercise he needed Dr Petersen testified that there is no  
 14 difference in the long run between participating in a structured rehabilitation  
 15 program and exercising regularly on his or her own, according to scientific studies  
 16 (Petersen Dep at 73 14-21, 76 12 – 77 8 )

17 The facts regarding Temple's ability to hire licensed staff to cover for him  
 18 also are disputed

- 19 ▪ Although Lisa Temple worked in the office for years on a part-time basis,  
 20 she did not want to try to become licensed. (Temple Dep at 201 1-11,  
 Lisa Temple Dep at 156 6-25 )
- 21 ▪ The only thing Temple did to try and hire licensed staff was call temporary  
 22 firms (Temple Dep at 195 15 – 196 20 )
- 23 ▪ Temple did not advertise for licensed staff (See Temple Dep at 195 15  
 – 204 21 )
- 24 ▪ Steve Crosby, another agent on the peninsula, helped his unlicensed staff  
 25 become licensed and paid her \$7 an hour plus commission (Crosby  
 Dep at 16 1 – 17 6, 22 14-23 )
- 26 ▪ Temple admits that he did not know or ask about the procedures for

1 getting someone licensed (Temple Dep at 198 8-20, 202 25 – 203 5 )

- 2 ▪ Temple claims that he spoke to someone about the possibility of hiring
- 3 them, but could not remember who or whether he spoke with more than
- 4 one person (Temple Dep at 199 12-24 )
- 5 ▪ Temple also did not pursue the possibility of having the daughter of agent
- 6 Helen Elwood help him out as a licensed staff person (Id at 162 16-19 )
- 7 ▪ Temple's former manager testified that she could not understand why
- 8 Temple claimed to have trouble finding support staff on the Olympic
- 9 Peninsula because "[o]ther agents in the district had licensed support
- 10 staff " (Watson Dep at 83 9-15, 84 9 – 88 2 )

11 The facts also are disputed on the issue of whether Temple could afford to

12 hire licensed staff Temple claims that he was unable to afford the cost of having

13 someone cover for him However, he also states in his declaration that he could

14 have afforded to pay licensed staff 15 hours a month without even making any

15 adjustments to his salary or Office Expense Allowance (OEA) (Temple Decl ¶ 21 )

16 Temple's declaration also states that he could not afford licensed staff because he

17 had \$264 per month for staff and advertising beyond the Yellow Pages, but had he

18 hired support staff in a similar arrangement to agent Steve Crosby's (with pay of \$7

19 an hour plus commission), it would only cost \$182 to have someone in the office for

20 26 hours a month Temple also admits that he easily could have increased the

21 amount of money available to hire staff (his OEA) by reducing his own income (Id)

22 This could have been a reasonable solution, as Temple himself says that he was a

23 successful insurance agent and "made a good living " (Temple Decl ¶ 13 ) There

24 are numerous genuine issues of material fact on Temple's claim that Allstate should

25 have allowed him to close his office for appointments

26 The second accommodation Temple claims Allstate should have made is

forcing other agents to combine offices with him so that another agent would be

available in the office when he left Even if Temple had notified Allstate that he

wanted to combine offices as an accommodation for his condition (which he did not

do), there is a factual dispute as to whether the agents wanted to combine offices with Temple<sup>12</sup> Although Temple provides declarations from agents Elwood, Koehler and Bondy claiming that Allstate managers discouraged them from joining offices with Temple, conflicting declarations from agent Elwood and manager Rollie Poulter indicate that two of the agents named by Temple (Elwood and Bondy) did not want to combine offices with him (See Declarations of Helen Elwood and Rollie Poulter in Support of Allstate's Motion for Summary Judgment at ¶¶ 3 and 5, respectively ) Temple admitted in his deposition that his plans to combine offices with Koehler fell apart because of location (Temple Dep at 46 3-8, 48 18-49 1, 83 12 – 86 10 ) The facts on this point are disputed

3 **Allstate Handled Temple's Later Requests for Accommodation Properly.**

Temple also makes the meritless claim that Allstate should have made two accommodations after he became totally disabled First, Temple claims that Allstate should have forced other agents to combine offices when his wife requested that in May 2000 However, it is undisputed that Temple was totally disabled at that point and could not have worked even with an accommodation (See Section V B 3 above ) Second, Temple contends that Allstate should have given him an extension on the June 1, 2000 deadline by which all agents had to decide whether to convert to independent contractor status But it is undisputed that Temple was notified of Allstate's plans to end its employee agency program and was advised of his options in mid-November 1999 – two months before he went on disability leave (See P Ex 1, Temple Decl at ¶ 115 ) Like all agents, Temple had more than seven months to decide whether to convert Allstate was not required to grant his request for an

<sup>12</sup> If the agents did not want to combine offices with Temple, Allstate was not required to force them to do so See Allstate's Motion for Summary Judgment at 42

1 indefinite extension See Walsh v. United Parcel Service, 201 F 3d 718 (6<sup>th</sup> Cir  
2 1000) (indefinite leave for employee to obtain information about his disability and  
3 recuperation period was not a "reasonable accommodation"), Duckett v. Dunlop Tire  
4 Co., 120 F 3d 1222 (11<sup>th</sup> Cir 1997) (indefinite leave is not a reasonable  
5 accommodation)

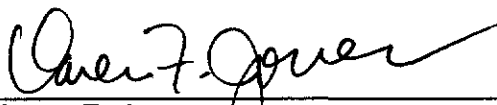
6 **VI. CONCLUSION**

7 For all of the foregoing reasons, Allstate Insurance Company respectfully  
8 asks the Court to deny Plaintiff's Motion for Partial Summary Judgment

9 DATED this 9<sup>th</sup> day of September, 2002

10 RIDDELL WILLIAMS P S

11  
12 By

  
13 Karen F. Jones, WSBA #14987  
14 Laurence A. Shapero, WSBA #31301  
15 Of Attorneys for Defendant Allstate  
16 Insurance Company  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26